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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 888

LOCALS 107, 312, 331, 384, 470, and 676, Affiliated With the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioners,

vs.

A. DUIE PYLE, INCORPORATED, A. E. F. TRANSPORTATION, INCORPORATED, and NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Third Circuit.

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A. DUIE PYLE, INCORPORATED, A. E. F. TRANSPORTATION, INCORPORATED, and NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Third Circuit.

Petitioners, Locals 107, 312, 331, 384, 470, and 676, each affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on the 11th day of September, 1967. That judgment reversed an order of the National Labor Relations Board dismissing a charge of unfair labor practices filed against Petitioners.

OPINIONS BELOW.

The opinion and judgment of the Court below are unreported and are printed in Appendix "A", *infra*, pages 1a-11a. The decision and order of the National Labor Relations Board (159 NLRB No. 1) are unreported and are printed in Appendix "B", *infra*, pages 12a-54a.

JURISDICTION.

The judgment of the court below was entered on the 11th day of September, 1967. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTION PRESENTED.

Whether Section 8(e) of the National Labor Relations Act prohibits contract clauses which are virtually identical to those before this Court in *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U. S. 283 and 362 U. S. 605, and which require that only bargaining unit employees drive equipment leased to the carriers who are party to the contract.

STATUTE INVOLVED.

The statutory provision involved is Section 8(e) of the National Labor Relations Act, as amended, 29 U. S. C. 158(e), and is printed in Appendix "C", *infra*, p. 55a.

STATEMENT.

In 1963, Local Teamster Unions Nos. 107, 312, 331, 384, 470 and 676 (hereinafter Union), all in the Philadelphia area, entered into a single collective agreement covering

a multi-employer unit established under past agreements and comprised of the employees of 84 carriers engaged in local cartage and over-the-road trucking under the authority of the Interstate Commerce Commission or the State Motor Authority (R. 26a-27a).[1] Respondents, A. Duie Pyle, Inc., and A. E. F. Transportation, Inc., are carriers in this bargaining unit (R. 27a, 39a).

Earlier agreements among these parties, as well as this 1963 agreement, contained valid union security provisions covering all employees working within this bargaining unit (R. 106a-107a).

The carriers have been using their own equipment as well as that driven by owner-operators and drivers for fleet owners, to carry on their regular local and over-the-road trucking business (R. 28a). These owner-operators and fleet owners do not have licenses, permits or certificates which would allow them to operate in interstate commerce except while driving for the carriers in the bargaining unit (R. 26a).

In 1963, for the first time, the parties also agreed to new provisions patterned after, and virtually identical to, those which were before this Court in *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U. S. 283 and 362 U. S. 605 (R. 32a-33a). These provisions covered the carriers' use of "owner-operators" and "fleet-owners"—persons who own, and, in the case of owner-operators, drive equipment leased to the carrier in the bargaining unit.[2]

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[1] References to "R" are to the Joint Appendix filed with the court below and certified hereto by the Clerk of such court.

[2] The Record to which the parties stipulated defined an "owner-operator" as "a person who owns either a truck-tractor or a truck-tractor and trailer and who leases the truck-tractor either with or without a truck-trailer to a carrier to be used for the transportation of various commodities by the Carrier under the authority of ICC or State Motor Authority, if any, and who then also drives and

Briefly stated, the challenged clauses[3] require that all equipment used by a unit carrier, whether owned or leased, must be driven by an employee of that carrier. Thus, owner-operators who wished to drive their equipment while it was leased could do so by becoming employees of their carrier-lessee, working under the terms and conditions, including wages and seniority rights, established for all that carrier's drivers.

More specifically, Section 4 of Article 23 provided that in all cases hired or leased equipment had to be operated by an employee of the certificated or permitted carrier and expressly reserved to the carrier "the right to control the manner, means and details of, and by which, the owner-operator performs his services, as well as the ends to be accomplished"—provisions similar to those found in the Interstate Commerce Commission's Rules and Regulations, Sec. 207.4(a)(4). In addition, to assure enforcement of the wage and benefit structure, the Article also set minimum rentals for the equipment driven by owner-operators and leased to unit carriers, a protective device approved by this Court in *Oliver*, 358 U. S. at 293-294.

These clauses were, at the time, found in trucking industry contracts covering more than 5,000 employers and over 150,000 employees in some 43 states (R. 29a-

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operates such equipment in the transportation of such commodities for the Carrier.

"(a) Occasionally the owner-operator may provide a substitute driver to operate his equipment in the transportation of such commodities for the carriers."

A "fleet-owner" was defined as one who "owns one or more truck-tractors, and leases such truck-tractors to one or more Carriers with or without drivers, for the purpose of transporting various commodities for the Carrier" (R. 26a).

[3] Though the Agreement covers local or city cartage and over-the-road hauling, it is, for convenience, printed as two separate contracts. The clauses are found in Article 23 of the over-the-road contract and Article 24 of the city cartage contract (R. 71a-80a).

31a).[4] A substantial number of the carriers bound by these other contracts operated in the Philadelphia area (R. 31a).

At the time these clauses were negotiated, unit employees, non-unit owner-operators, and non-unit drivers for fleet owners were engaged in local cartage and over-the-road trucking, all transporting the same commodities, exercising the same skills requiring the same job qualifications, and operating out of, or directed from, the same terminals. Certain unit employees also owned the equipment they drove; others drove leased equipment (R. 28a-29a).

Essentially then, the challenged clauses prevented the carriers party to the collective agreement from continuing to use non-unit personnel to perform the local cartage and over-the-road trucking work covered by their contract and traditionally done by unit employees, but permitted them to continue to lease equipment if they used their own employees to drive it.

A. Proceedings before the National Labor Relations Board.

Upon execution of the collective bargaining agreement containing these contract clauses, a number of employers who were party to the agreement filed charges with the National Labor Relations Board alleging that such contract clauses were in violation of Section 8(e) of the Act. Thereafter the General Counsel issued his complaint and joined in an all-party stipulation of facts. On this record

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[4] Since then, these (or similar) clauses have become part of the National Master Freight Agreement covering approximately 8,000 employers and 450,000 employees (N. Y. Times, May 6, 1967, at 36, col. 2 (City ed.); N. Y. Times, Feb. 16, 1967, at 20, col. 4 (City ed.)).

the Board considered the briefs of the parties and made its decision and order dismissing the charges.

The Board found that the work of the drivers of leased equipment was "sufficiently comparable in character, and the terms under which it is done sufficiently affect the terms and conditions of the work done in the unit, to cause the Union to have a direct and necessary interest in the work" (33a, *infra*). The Board rejected the argument that the "cessation in business relationships" which might result from application of these clauses affected their legality. Adoption of this argument, it concluded, would mean that "once work had been subcontracted it could never be considered to be unit work because it would disrupt business relationships to require the employer to cease doing business with its subcontractors" (34a, *infra*). Relying on the *Oliver* cases, the Board stated:

> "The Unions' goal, and the thrust of the clause in question, is to assure the performance of unit work by unit employees in accordance with the terms and conditions set out in the Unions' contracts with the employers governing the greater part of the work performed and controlled from their respective locations" (35a, *infra*).

B. Proceedings in the Court Below.

Upon Petition for Review, the Court of Appeals for the Third Circuit affirmed in part and reversed in part. It found that the Union had a right to bargain for contract language which required all persons driving for the carriers to receive wages and benefits equal to those paid unit employees, but not the right to bargain for language which would require that all unit work be performed by employees if the new employees were required to become union members. Accordingly, the Court sustained those provisions dealing with wages, working conditions, and

minimum equipment rentals, but rejected the provisions requiring that all leased equipment be driven by bargaining unit employees. This conclusion was based on the Court's judgment that the provisions which required drivers of leased equipment to receive the equivalent of Union negotiated wages and economic benefits, standing by themselves, effectively protect "against substandard competition, which might be an incentive for an employer to deprive his unionized employees of work," (8a, *infra*); that, therefore, the requirement that drivers of leased equipment become employees, together with the incidental application of the contract's valid, long-established union security clause establishes a prohibited "secondary" objective.

Reasons for Granting Certiorari.

In *Local 24, International Brotherhood of Teamsters v. Oliver,* 358 U. S. 283, decided in January, 1959, this Court held that virtually the same contract clauses here involved constituted an "agreement upon a subject matter as to which federal law directs [the parties] to bargain," 358 U. S. at 295; and that, because they had the primary purpose of protecting working standards, these provisions were beyond the reach of state anti-trust laws, 358 U. S. at 295-297.

Shortly thereafter the Congress undertook extensive revisions of the National Labor Relations Act, motivated in part by claims that the International Brotherhood of Teamsters had been seeking to gain its primary goals by contract clauses applying secondary pressures. The enactment of Section 8 (e) was the Congressional response to these alleged "hot cargo" abuses. *National Woodwork Manufacturers Assn. v. NLRB,* 386 U. S. 612, at 635-636. Yet nowhere in the committee reports or congressional debates was there any reference to the *Oliver* case or a criticism of the particular contract clauses there involved.

This Court has, therefore, acted consistently with this legislative history when it has continued to cite *Oliver* with approval. Thus, in *Fibreboard Paper Products Corp. v. NLRB,* 379 U. S. 203, 213, it was held that "the only difference between that case [*Oliver*] and the one at hand is that the work of the employees in the bargaining unit was let out piecemeal in Oliver, whereas here the work of the entire unit has been contracted out."

As this Court pointed out in *Oliver, supra,* the problem of protecting bargaining unit work in the trucking industry had a long and troubled history. The clauses regulating the use of owner-operators, and prohibiting non-unit personnel from driving equipment (including leased equipment) in the service of the employer, resolved the conflict between the carrier's need to augment his equipment and drivers by leasing equipment and using owner-operators (or the drivers of leased fleet equipment) and the union's need to establish and protect decent working conditions and preserve work opportunities for drivers in the trucking industry.[5] These clauses are, in this Court's words, "a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract," *Oliver,* 358 U. S. at 294; see also: Brief for the Respondent, NLRB to the court below, pp. 27-28.

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[5] The problems of work protection for unit employees against the undermining competitive effects of independent contractors are presently before this Court in a different context in *American Federation of Musicians v. Carroll,* Docket No. 309, cert. granted October 9, 1967, in which it is argued that the principles set forth in *Oliver* have great significance in "not only musical club dates, but also trucking, the building trades, the garment industry and numerous others where employers work at the trade." Petitioners Reply Brief, p. 2. Other questions of employees and independent contractors are presented in *United Insurance Co. of America v. NLRB,* Docket No. 178, cert. granted October 9, 1967. Related matters in the trucking industry were also considered by this Court in *United States v. Drum,* 368 U. S. 370, and *American Trucking Assns. v. United States,* 344 U. S. 298.

However, the court below treated as severable those provisions of the contract which this Court, in *Oliver*, treated as a single solution to a difficult problem. The provision establishing wages and working conditions of owner-operators simply affirms their employee status. The provision establishing minimum rental for use of equipment driven by the owner-operator prevents the erosion of his wages as an employee. But neither of these provisions was intended to apply separately from the provision that all unit work must be performed by employees within the unit. That is the heart of the solution. These provisions do not provide for the conditions under which independent contractors shall perform unit work. They reserve such unit work to employees in the unit, and provide for the conditions under which a certain type of employee (the owner-operator) shall perform this work. Indeed, this Court stated in the second *Oliver* case that the provision requiring even the fleet owner to become an employee when he drove leased equipment was "at least as intimately bound up with the subject of wages as the minimum rental provisions . . ." *Oliver*, 362 U. S. 605-606.[6]

Because of the failure to recognize this basic point, the decision below not only threatens the continued use

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[6] Even in the absence of contract, the National Labor Relations Board has frequently held that owner-operators and drivers for fleet owners are bargaining unit employees subject to the carrier's relations with the bargaining representative of the drivers of its own equipment. *National Freight Company*, 146 NLRB 144; *Bowman Transportation, Inc.*, 142 NLRB 1093; *Western Nebraska Transport Service*, 144 NLRB 301; *Manpower, Inc.*, 164 NLRB No. 37. Similarly, the Interstate Commerce Commission has held that carriers are responsible for the acts and work of owner-operators driving for their lessee. *Dixie-Ohio*, 17 M.C.C. 735; *Ex parte M. C. 43*, 52 M.C.C. 695. In addition, there are special problems of requiring adherence to wage structures and benefit plans because it is unlawful for owner-operators to participate in the contract's insurance and pension programs unless they are employees. 29 U. S. C. 186(c); 26 U. S. C. 401-402, 501(a).

of these clauses in the thousands of situations in which they are now applicable, but may well lead to grave industrial strife in the transportation industry by causing a revival of the conditions which originally led to their adoption. Hence, the court below, contrary to this Court's reaffirmation of *Fibreboard Paper Products Corp. v. N. L. R. B.*, 379 U. S. 203, in *National Woodwork, supra*, at 642, has interpreted "Section 8(e) to invalidate clauses . . . which have been successfully incorporated through collective bargaining in major labor agreements" and to frustrate "Congress' deep commitment to the resolution of matters of vital importance to management and labor through the collective bargaining process." Ibid at 649 (Harlan, J., concurring).

In short, the Court of Appeals, in reversing the Board, adopted a theory totally at odds with this Court's specific approval of the *Oliver* clauses as an appropriate solution to problems which have a direct "impact on the product market and the interests of union members." *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U. S. 676, at 690, n. 5.

Because the court below misunderstood *Oliver*, it failed to grasp the crux of the Board's decision—that the Union had a legitimate primary interest in reclaiming for the bargaining unit the local cartage and over-the-road driving work which the Carriers had diverted to non-unit personnel, as well as in protecting against erosion that portion of the work which the Carriers' employees were performing at that time (R. 27a, 39a). That this would lead to an expansion in the amount of work and the number of employees in the bargaining unit makes the union's interest no less primary (35a-37a, *infra*). *United Auto Workers v. N. L. R. B.* (*General Motors*) (D. C. Cir. 1967), 381 F. 2d 265; cert. denied Oct. 9, 1967, Docket No. 316.

Unlike the Court of Appeals here, the Court of Appeals for the District of Columbia Circuit has held that when a union is concerned with work which is "fairly claimable" because of its similarity to, and historic derivation from, unit work, it may "recapture" this work for the unit through collective bargaining even though the precise work involved had never been done by unit employees.

> "Activity and agreement which directly protects fairly claimable jobs are primary under the Act. Incidental secondary effects of such activity and agreement do not render them illegal." *Meat and Highway Drivers, Local 710 v. NLRB (Wilson and Co.)* (D. C. Cir., 1964), 335 F. 2d 709, 713.

In coming to its conclusion, the court below erroneously treated the challenged clauses as both requiring the owner-operators to become employees (and hence union members) and as permitting them to remain independent contractors:

> "The parties here, however, carefully refrained from prohibiting subcontracting and the provision requiring that the subcontractees become employees and join the union must therefore be judged as it was written and not as if it were a different case completely prohibiting all subcontracting" (10a, *infra*).

But, as Section 2(3) of the Act makes clear, subcontractors and employees are mutually exclusive categories. Cf. *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111. Therefore, by agreeing that only the carrier's own employees may drive his equipment, the parties did more than limit the scope of subcontracting; they completely prohibited all subcontracting—"a legitimate device to protect the economic integrity of the bargaining unit." *Bakery Wagon Drivers Local 484 v. NLRB* (D. C. Cir. 1963), 321 F. 2d 353, 357.

Where, as here, the collective agreement creates a system designed for the preservation and reclamation of bargaining unit work, the contractual relationship falls under the same protective policies which this Court approved in *National Woodwork, supra.*

Finally, the practical effect of the lower court's concern with the application of a union security provision to persons who become employees is to make the legality of the clauses under Section 8 (e) turn upon the various state laws on union security, a result clearly out of harmony with the Congressional intent to achieve a uniform national policy concerning the "primary-secondary" dichotomy (*Local 20, International Brotherhood of Teamsters v. Morton,* 377 US 252), and peculiarly inappropriate for an industry whose employees constantly cross and recross state lines, working in the nation's thirteen right-to-work states, as well as in those states where union security provisions are lawful. Thus the court below has rejected a collectively negotiated solution to a basic labor problem by focusing on an incidental provision which varies from state to state instead of being guided by the national policies which were designed to protect the activity and agreement of the Union.

In sum, the decision below is disruptive of a widely applied collectively negotiated solution to a vital and difficult problem in the trucking industry; frustrates the Congressional intent to permit this type of solution; blurs the distinction between employees and subcontractors on which the primary-secondary dichotomy has developed; unjustifiably limits the scope of bargaining unit work protection to that precise amount of work presently being performed by bargaining unit employees; makes legality under Section 8 (e) dependent upon state law; and conflicts with this Court's decisions in the *Oliver* cases and *National Woodwork,* as well as the *Wilson* and *Auto Workers* decisions of the District of Columbia Circuit.

The decision below, therefore, raises most important questions under national labor policy which only this Court can clarify and resolve.

For the reasons stated, this petition should be granted.

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